

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

ORDER

Pending before the Court is the Motion for Preliminary Injunction, (ECF No. 5), filed by Plaintiffs Marco Paulo Rodrigues Lorador and Paulo Renato Rodrigues Lorador (collectively, “the Alexis Brothers”). Defendants Cirque du Soleil Nevada Newco, Inc. (“Cirque”), Treasure Island, LLC, Michelle Kolev, and Nicole Kolev (collectively, “Defendants”) filed a Response, (ECF No. 18), and the Alexis Brothers filed a Reply, (ECF No. 19).¹

For the reasons discussed below, the Court **GRANTS in part** and **DENIES in part** the Alexis Brothers' Motion for Preliminary Injunction.

I. **BACKGROUND**

This case arises out of Defendants' alleged infringement of the Alexis Brothers' copyrighted hand-balancing routine "Peace and Discord" ("the Work"). Hand-balancing, or "hand-to-hand" as Cirque refers to the Work, can be described as "a type of performance in which an acrobatic base and flyer balance on top of each other in either a gymnastic or acrobatic medium . . . [i]t combines strength, agility, flexibility, and balance." See Wikipedia, the Free Encyclopedia, Hand to Hand Acrobatics, at https://en.wikipedia.org/wiki/Hand_to_Hand_acrobatics

¹ The Court will address Defendants' Motion to Dismiss, (ECF No. 16), by separate order.

1 hand acrobatics (last visited Mar. 5, 2022). (*See also* Prelim. Inj. Hearing Tr. 9:46:45–9:47:46)
 2 (explaining that Cirque refers to the Alexis Brothers’ Work as “hand-to-hand”).

3 In 1991, the Alexis Brothers created their hand-balancing Work, which they published on
 4 March 12, 1994, through a public performance. (Am. Compl. ¶¶ 9–10, ECF No. 11). The
 5 Alexis Brothers describe the Work as “abstractly conveying the dynamic between two brothers
 6 through choreographed movement and hand-balancing.” (*Id.* ¶ 10). On February 6, 2003, the
 7 Alexis Brothers registered the Work as choreography with the United States Copyright Office,
 8 receiving the registration number of PA0001133364. (*Id.*). The Alexis Brothers provided the
 9 Court with the video of their hand-balancing Work that they submitted to the U.S. Copyright
 10 Office (“Alexis Video”), which the Court has viewed. (Alexis Video, Ex. 5 to Mot. Prelim. Inj.,
 11 ECF No. 6).

12 Since 1997, the Alexis Brothers regularly performed the Work in Cirque Du Soleil’s
 13 show “Mystere” at Treasure Island Hotel and Resort. (*Id.* ¶ 8). Periodically, when the Alexis
 14 Brothers were unavailable to perform, Cirque licensed the Work so other performers could fill-
 15 in for the Alexis Brothers in the show. (Mot. Prelim. Inj. 7:14–16, ECF No. 5); (Marco Lorador
 16 Decl. ¶ 6, Ex. 1 to Mot. Prelim. Inj., ECF No. 5). In early 2020, Mystere ceased performances
 17 due to the COVID-19 pandemic, which the Alexis Brothers also allege led to Cirque filing for
 18 bankruptcy. (*Id.* ¶ 12).

19 Over a year after Mystere closed, the Alexis Brothers learned that Cirque planned to
 20 reopen the show in July 2021. (*Id.* ¶ 13). However, Cirque did not re-hire the Alexis Brothers
 21 to perform the Work. (*Id.*). Instead, Cirque replaced the Alexis Brothers with two different
 22 hand-balancing performing artists: Michelle Kolev and Nicole Kolev (“the Kolev Sisters”).²

25 ² Mystere re-opened on June 28, 2021. (Compl. ¶ 17). The Kolev sisters debuted in the show one month later on July 27, 2021. (*Id.* ¶ 18). From June 28, 2021, until July 27, 2021, a different act featuring two Russian performers filled the hand-balancing segment of Mystere, but they are not accused of copying the Work. (*Id.*).

1 (Id. ¶ 14). The Alexis Brothers claim that the Kolev Sisters' hand-balancing performance is
2 "substantially a copy of the Work" and that Cirque has not licensed the Work from them. (Id.).

3 On September 8, 2021, the Alexis Brothers filed the present case, alleging copyright
4 infringement under The Copyright Act of 1976, 17 U.S.C. § 502, along with their Motion for
5 Preliminary Injunction. (See Mot. Prelim. Inj., ECF No. 5). Briefing on the Motion for
6 Preliminary Injunction was completed on November 9, 2021, and the Court set a preliminary
7 injunction hearing for December 16, 2021. (Reply, ECF No. 19); (Order Setting Hearing, ECF
8 No. 25). However, the parties opted to submit supplemental briefing in lieu of a hearing.
9 (Order Granting Stipulation to Vacate Hearing, ECF No. 32). Nonetheless, after reviewing the
10 supplemental briefing, the Court scheduled another preliminary injunction hearing, which was
11 held on February 11, 2022. (Order Setting Hearing, ECF No. 35); (Mins. Proceedings, ECF No.
12 36).

13 **II. LEGAL STANDARD**

14 Preliminary injunctions are governed by Rule 65 of the Federal Rules of Civil
15 Procedure, which provides that a "court may issue a preliminary injunction only on notice to
16 the adverse party." Fed. R. Civ. P. 65(a)(1). Injunctive relief, whether temporary or permanent,
17 is an "extraordinary remedy, never awarded as of right." *Winter v. Natural Res. Defense*
18 *Council*, 555 U.S. 7, 24 (2008). "A plaintiff seeking a preliminary injunction must establish
19 that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the
20 absence of preliminary relief, that the balance of equities tips in his favor, and that an
21 injunction is in the public interest." *Am. Trucking Ass 'ns, Inc. v. City of Los Angeles*, 559 F.3d
22 1046, 1052 (9th Cir. 2009) (quoting *Winter*, 555 U.S. at 20). Injunctive relief is "an
23 extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is
24 entitled to such relief." *Winter*, 555 U.S. at 20. "[C]ourts must balance the competing claims of
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1 injury and must consider the effect on each party of the granting or withholding of the
2 requested relief.” *Id.* at 24 (internal quotation marks omitted).

3 **III. DISCUSSION**

4 **A. Likelihood of Success on the Merits**

5 To be granted a preliminary injunction, the Alexis Brothers first must show that they are
6 likely to succeed on the merits of their copyright infringement claim. A successful copyright
7 infringement claim requires that the claimant demonstrate two elements: (1) ownership of a
8 valid copyright; and (2) copying by the defendant of the protected work’s protected elements.

9 *See Smith v. Jackson*, 84 F.3d 1213, 1218 (9th Cir. 1996) (citing *Apple Computer, Inc. v.*
10 *Microsoft Corp.*, 35 F.3d 1435, 1439, 1442 (9th Cir. 1994)). The Court will discuss each
11 element in turn.

12 **1. Ownership of a Valid Copyright**

13 To establish the validity of their copyright, the Alexis Brothers argue that the Court
14 should defer to the expertise of the U.S. Copyright Office, and that because the U.S. Copyright
15 Office accepted the Alexis Brothers’ copyright registration of the Work, so should this Court.
16 (Pls.’ Suppl. Brief 3:27–4:6, ECF No. 34). Further, the Alexis Brothers assert that the Work is
17 “a theatrical work of just the kind copyright protects.” (*Id.* 4:7–10).

18 A certificate of copyright registration constitutes *prima facie* evidence of a copyright’s
19 validity, creating a rebuttable presumption of validity. 17 U.S.C. § 410(c); *United Fabrics Int’l,*
20 *Inc. v. C&J Wear, Inc.*, 630 F.3d 1255, 1257 (9th Cir. 2011); *Apple Computer, Inc. v. Formula*
21 *Intern. Inc.*, 725 F.2d 521, 523 (9th Cir. 1984). 17 U.S.C. § 410(c) provides:

22 In any judicial proceedings the certificate of a registration made before or within
23 five years after first publication of the work shall constitute *prima facie* evidence
24 of the validity of the copyright and of the facts stated in the certificate. The
evidentiary weight to be accorded the certificate of a registration made thereafter
shall be within the discretion of the court.

1 In the present case, the Court takes judicial notice³ of the Alexis Brothers' copyright
 2 registration certificate, which is available on the U.S. Copyright Office's Public Catalog
 3 through a search of the registration number. *See Swift Park's Trading Europe B.V. v. Target*,
 4 No. SA CV 18-0536-DCC, 2018 WL 8333362, at *3 (C.D. Cal. July 5, 2018) (taking judicial
 5 notice of a copyright registration certificate by using a screenshot of the protected work's
 6 registration number search results on the U.S. Copyright Office's Public Catalog); *QOTD Film*
 7 *Inv. Ltd. v. Does*, No. 2:16-cv-00928-APG-GWF, 2016 WL 8735619, at *3 (D. Nev. May 6,
 8 2016) (finding that the plaintiff is the registered owner of a copyrighted work based on the
 9 copyright's registration number).

10 The copyright registration reveals that the Work was published in 1994 and registered in
 11 2003, so more than five years elapsed between publication and registration. (See also Compl. ¶
 12 10). Therefore, it is within this Court's discretion to determine whether the copyright
 13 registration certificate creates a *prima facie* case of validity. *See* 17 U.S.C. § 410(c). There is
 14 nothing in the record to undermine the validity of the registration certificate or to indicate that
 15 the Court should not accept the Work's copyright registration certificate as *prima facie*
 16 evidence of validity. To the contrary, Cirque actually licensed the Work from the Alexis
 17 Brothers in the past, respecting the validity of the copyright registration. (Mot. Prelim. Inj.
 18 7:14–16, ECF No. 5); (Marco Lorador Decl. ¶ 6, Ex. 1 to Mot. Prelim. Inj., ECF No. 5).
 19 Therefore, the Court exercises its discretion to allow the Work's registration certificate to
 20 constitute *prima facie* evidence of validity, even though more than five years elapsed between
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22 ³ The Court may take judicial notice of a fact that is not subject to reasonable dispute because it . . . can be
 23 accurately and readily determined from sources whose accuracy cannot reasonably be questioned. Fed. R. Civ. P.
 24 201(b)(2). Courts in the Ninth Circuit have taken judicial notice of copyright registration certificates under Rule
 25 210(b)(2). *See, e.g., Oroamerica Inc. v. D & W Jewelry Co., Inc.*, 10 Fed. Appx. 516, n. 4 (9th Cir. 2001)
 (Unpub. Disp.) (granting a request that the court take judicial notice of a supplemental copyright registration
 certificate); *Vigil v. Walt Disney Co.*, Nos. C-95-1790-MHP; C-95-1277-MHP, 1995 WL 621832, at *1–2 (N.D.
 Cal., Oct. 16, 1995) (taking judicial notice of copyright registration certificates).

1 publication and registration. *See Lifetime Homes, Inc. v. Residential Dev. Corp.*, 510 F. Supp.
2d 794, 801 (M.D. Fl. 2007) (finding that a copyright registration certificate filed seven years
3 after publication still created a *prima facie* case of validity because “Defendants have not
4 pointed to any evidence indicating that Plaintiff’s certificate of registration is not valid.”). As
5 such, there is *prima facie* evidence of the validity of the Alexis Brothers’ copyright, and the
6 burden shifts to Defendants to rebut that presumption.

7 Defendants argue that the Alexis Brothers do not have a valid copyright in the Work by
8 claiming that hand-balancing is not copyrightable choreography. (See Defts.’ Suppl. Brief 3:3–
9 4:9, ECF No. 33). Defendants explain that certain sequences of physical movements, such as
10 feats of physical skill or dexterity, are not registrable with the U.S. Copyright Office as
11 choreographic works. (*Id.* 3:19–21). Defendants assert that hand-balancing is merely a
12 “compilation of feats of physical skill and balance” and “solely a display of physical strength,”
13 and thus, is not copyrightable as choreography. (*Id.* 3:21–27).

14 Copyright protection extends to works of authorship, including choreographic works,
15 fixed in any tangible medium of expression. 17 U.S.C. § 102(a)(4). The U.S. Copyright Office
16 defines choreography as “the composition and arrangement of a related series of dance
17 movements and patterns organized into a coherent whole.” *See* U.S. Copyright Office, Circular
18 52 (2021). Because this is quite a broad definition, the U.S. Copyright Office has further
19 provided a non-exclusive list of examples of common elements of choreography, which
20 include:

- 21 1. Rhythmic movements of one or more dancers’ bodies in a defined sequence
and a defined spatial environment
- 22 2. A series of dance movements or patterns organized into an integrated,
coherent, and repressive compositional whole
- 23 3. A story, theme, or abstract composition conveyed through movement
- 24 4. A presentation before an audience
- 25 5. A performance by skilled individuals
6. Musical or textual accompaniment

1 (Id. at 1). The U.S. Copyright Office clarifies that “functional physical movements, feats of
2 physical skill or dexterity, and ordinary motor activities—in and of themselves—are not
3 eligible for registration as choreography because these movements do not represent the type of
4 authorship that Congress intended to protect as choreography.” (Id. at 3). Examples of non-
5 copyrightable functional physical movements include: general exercise routines, athletic
6 activities (tennis swing, golf swing, slam-dunk maneuver), feats of physical skill or dexterity,
7 skateboarding/snowboarding tricks, yoga poses and sequences, or a compilation of any of these
8 movements. (Id. at 4).

9 Defendants essentially argue that the Alexis Brothers’ hand-balancing Work is more
10 akin to non-copyrightable functional physical movements than to copyrightable dance
11 movements. However, hand-balancing is not an exercise routine, yoga sequence, skateboarding
12 trick, or golf swing, meaning that the only non-copyrightable functional physical movement left
13 for Defendants to analogize hand-balancing with is a “feat of physical skill or dexterity.” The
14 U.S. Copyright Office has not provided any further instruction regarding feats of physical skill
15 or dexterity, and Defendants have not provided the Court with a single example, either from the
16 U.S. Copyright Office or another court, of attempted choreography labeled as non-
17 copyrightable because it is merely a feat of physical skill or dexterity. Therefore, it is not clear
18 to the Court what a non-copyrightable feat of physical skill or dexterity looks like, especially
19 when considering that copyrightable dances, such as ballet or modern dance, certainly also
20 involve feats of physical skill and dexterity.

21 With that being said, the Court agrees with Defendants that the Alexis Brothers’ hand-
22 balancing Work involves incredible feats of physical skill and dexterity. Nonetheless, the
23 Court is unconvinced that the physical skill, strength, balance, and dexterity required to
24 perform a hand-balancing routine detracts from the fact that the Work also encompasses well-
25 established authorship elements of copyrightable choreography. For example, the Alexis Video

1 demonstrates that the Work encompasses movements organized into a compositional whole,
2 tells the story of the dynamic between two brothers, was regularly performed in front of
3 Mystere's audiences, is certainly performed by skilled individuals, and is set to music. (See
4 generally Alexis Video, Ex. 5 to Mot. Prelim. Inj.).

5 In sum, Defendants have failed to establish the line between copyrightable dance
6 movements that include feats of physical skill or dexterity, and non-copyrightable standalone
7 feats of physical skill and dexterity. Therefore, because the Work encompasses more elements
8 of copyrightable dance than similarities to non-copyrightable functional physical movements,
9 and because Defendants have not produced any examples of non-copyrightable feats of
10 physical skill or dexterity, the Court finds that Defendants failed to meet their burden to rebut
11 the presumption of validity in the Alexis Brothers' copyright. Thus, the copyright is presumed
12 valid, and the Alexis Brothers have shown a likelihood of success at demonstrating a valid
13 copyright.

14 2. Copying of the Protected Elements of the Work

15 The second element of the infringement analysis requires a consideration of two factors:
16 copying and unlawful appropriation. *See Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1064 (9th
17 Cir. 2020) (citing *Rentmeester v. Nike, Inc.*, 883 F.3d 1111, 1116–1117 (9th Cir. 2018)).
18 “Copying can be demonstrated either through direct evidence or ‘by showing that the defendant
19 had access to the plaintiff’s work and that the two works share similarities probative of
20 copying,’ while ‘the hallmark of ‘unlawful appropriation’ is that the works share substantial
21 similarities.” *Corbello v. Valli*, 974 F.3d 965, 974 (9th Cir. 2020) (quoting *Skidmore*, 952 F.3d
22 1051, 1064 (*Rentmeester v. Nike, Inc.*, 883 F.3d 1111, 1117 (9th Cir. 2018))). Since there is no
23 direct evidence of copying in this case, the Court will first discuss Defendants’ access to the
24 Work, before turning to an analysis of whether the Kolev Sisters’ hand-balancing routine is
25 substantially similar to the Alexis Brothers’ Work.

1 ***a. Access***

2 To successfully prove “access” in the case of a copyright infringement claim, a plaintiff
 3 must show a reasonable probability that an alleged infringer had the chance to view the
 4 protected work. *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 481 (9th Cir. 2000). Here,
 5 there is no doubt that Defendants had access to the Work. The Alexis Brothers performed the
 6 Work in *Mystere* for approximately 23 years, which means that the Work was available to be
 7 viewed by the public for 23 years. Therefore, Defendants could have easily accessed the Work:
 8 the Work was being performed in Cirque’s own show at Treasure Island Hotel and Resort, and
 9 the Kolev Sisters certainly had the chance to attend a public performance. A February 7, 2019,
 10 Facebook post from Michelle Kolev further confirms that the Kolev Sisters have seen the
 11 Alexis Brothers perform and have been watching videos of the Alexis Brothers for years. (Mot.
 12 Prelim. Inj. 3:18–4:11). Accordingly, the court is satisfied that Defendants had a chance to
 13 view the protected Work.⁴

14 ***b. Substantial Similarity***

15 In the Ninth Circuit, the substantial similarity test contains an extrinsic and an intrinsic
 16 component. *Corbello*, 974 F.3d at 974 (quoting *Funky Films, Inc. v. Time Warner Ent. Co.*,
 17 L.P., 462 F.3d 1072, 1077 (9th Cir. 2006)). “Only if the extrinsic analysis succeeds does the
 18 so-called ‘intrinsic’ analysis take[] place.” *Id.* The Court will discuss each in turn.

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22 ⁴ Defendants provide a YouTube video dated February 28, 2020, of the Kolev Sisters performing the same act
 23 that they now perform in “*Mystere*” to demonstrate that the Kolev Sisters created their hand-balancing routine
 24 prior to being hired by Cirque, and thus, lacked access to the Work before they created their act. (See Defts’
 25 Resp. 12:20–26, ECF No. 18) (<https://www.youtube.com/watch?v=qOUfTTS8Yeo>). However, this video is still
 dated after the Kolev Sisters’ 2019 Facebook post confirming that they saw the Alexis Brothers perform.
 Further, Michelle Kolev’s November 2021 declaration states that the Sisters created their routine “2-3 years
 ago,” which indicates that the routine could have been created around or after the time the Sisters saw the
 Brothers perform in February 2019. (Kolev Decl. ¶ 6, Ex. 2 to Resp., ECF No. 18-2). Finally, the Kolev Sisters
 still had access to the Work through the *Mystere* show for the past 23 years.

i. Extrinsic Test

2 The Alexis Brothers allege that Defendants infringed on the Work because the Kolev
3 Sisters' performance copies "a dozen or so similar poses in similar sequence with similar
4 transitions." (Pls' Suppl. Brief 7:17–23, ECF No. 34). Nonetheless, Defendants argue that the
5 Kolev Sisters' act cannot be extrinsically similar to the Work because hand-balancing poses are
6 unprotectable material for copyright purposes. (Defts' Suppl. Brief 12:1–12, ECF No. 33).
7 They also assert that, while there are some similarities between the two hand-balancing
8 performances, the majority of the transitions and poses in the parties' respective performances
9 are not executed by the other party; the entirety of the two performances are completely
10 different in concept, feel, and execution. (*Id.* 7:3–6, 19–21).

11 The extrinsic test looks to analytically dissect and break down the copyrighted work and
12 the allegedly infringing work “into their constituent elements and compare those elements for
13 proof of copying.” *Benay v. Warner Bros. Entm’t*, 607 F.3d 620, 624 (9th Cir. 2010) (citing
14 *Swirsky v. Carey*, 376 F.3d 841, 844 (9th Cir. 2004)). To do so,

[t]he extrinsic test requires a three-step analysis: (1) the plaintiff identifies similarities between the copyrighted work and the accused work; (2) of those similarities, the court disregards any that are based on unprotectable material or authorized use (non-protectable elements include ideas; historical facts; common phrases; scenes-a-faire (that is, situations and incidents that flow necessarily or naturally from a basic plot premise or generic plot line) and familiar stock scenes and themes that are staples of literature); and (3) the court must determine the scope of protection (“thick” or “thin”) to which the remainder is entitled “as a whole.”

²¹ *Corbello*, 974 F.3d at 974 (citing *Apple Computer*, 35 F.3d at 1443).

22 Here, to identify similarities between the Work and the Kolev Sisters' act, the Alexis
23 Brothers provided an 8-minute video depicting the Kolev Sisters' performance in *Mystere*
24 ("Kolev Video") and the 12-minute Alexis Video. (See Kolev Video, Ex. 4 to Mot. Prelim. Inj.,

1 ECF No. 6); (Alexis Video, Ex. 5 to Mot. Prelim. Inj.). There are two segments⁵ of the Kolev
 2 Sisters' act that appear similar to the Work. Segment 1 is found at minutes 2:38–3:43 of the
 3 Kolev Video and is compared to minutes 5:50–6:38 of the Alexis Video. (Kolev Video, Ex. 4 to
 4 Mot. Prelim. Inj., ECF No. 5); (Alexis Video, Ex. 5 to Mot. Prelim. Inj., ECF No. 5). Segment
 5 2, the finale of both performances, is found at minutes 6:32–8:13 of the Kolev Video and is
 6 compared to minutes 7:53–9:30 of the Alexis Video. (*Id.*).

7 To analyze the similarities within the two segments, the Court closely scrutinized each
 8 video, individually and through side-by-side comparisons. However, because the videos
 9 themselves cannot be inserted into this Order, the Court will instead provide chronological
 10 screen shots of the different poses, accompanied by a description of any differences that were
 11 made apparent through video:

12
 13 **Segment 1** (Kolev Video: 2:38–3:43; Alexis Video: 5:50–6:38):



19 In the above photos, the two sets of siblings engage in an identical pose. The bottom sibling lies on their side on
 20 the ground, while the top sibling balances in a handstand position.
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25⁵ The Alexis Brothers actually identified three segments, but the first two segments occur right after one another, so the Court does not see a reason to analyze them separately.



7 In the above segment, the siblings perform a similar maneuver. Both bottom siblings flip underneath the top
8 sibling. The bottom sibling then lifts their legs into a v-shape, opened towards the sky, before moving their legs
9 down to the floor. The major difference in this sequence is that the bottom brother lowers his legs to the floor in
a much slower and more controlled manner than the bottom sister. Additionally, while the bottom brother ends
by laying with both legs flat on the ground, the bottom sister leaves one leg flat on the ground and one bent.



15 In the above photos, the siblings perform a similar maneuver. The bottom sibling lies on their back with their
16 hands over their head, where they balance the top sibling. The bottom sibling then starts moving the top
17 sibling towards their chest, before lifting them in the air. This sequence differs in leg positioning; the
bottom sister crosses her legs on the ground while she lifts her sister. The bottom brother puts one leg
straight in the air and bends the other as he lifts his brother.



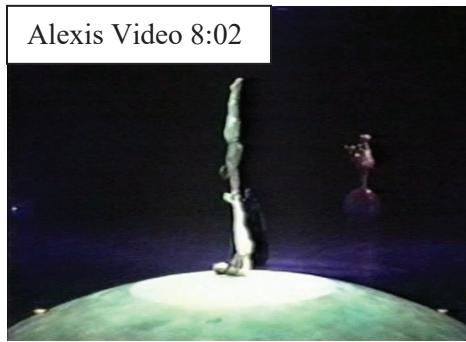
25 In the above maneuver, the siblings perform another similar pose. The bottom sibling balances their
counterpart's head on one foot, bringing the other leg into the air, and then slowly lowering it back down to the

1 ground. The difference is that when the bottom sister brings her leg into the air, she moves it up and down for a
 2 moment before extending it.

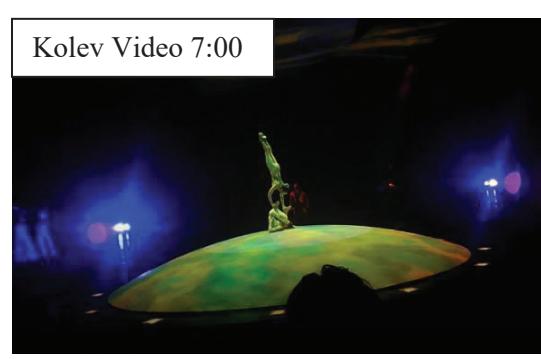
3 **Segment 2 (Kolev Video: 6:32–8:13; Alexis Video 7:53–9:30)**



9 In the above photos, the siblings perform a very similar maneuver. The top sibling hoists themselves up into the
 10 air while placing their hands on the bottom siblings' feet. Each top sibling then positions their legs parallel to the
 11 ground before flipping into a headstand. The differences are that when the top brother hoists himself up, he does
 so with straight legs; the top sister tucks her legs. Then, when the top brother flips into a headstand, he keeps his
 legs together; the top sister opens her legs into a v-shape bringing them back together.



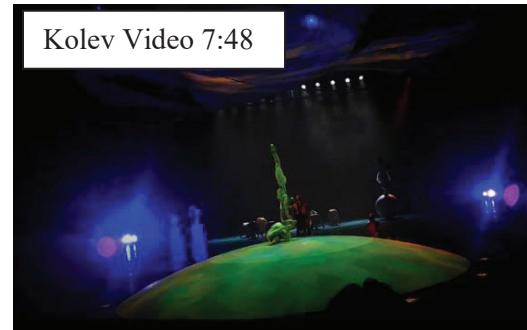
17 The above segments are identical. The top sibling holds a handstand on the bottom siblings' feet.



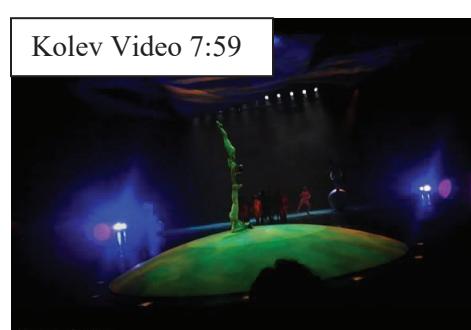
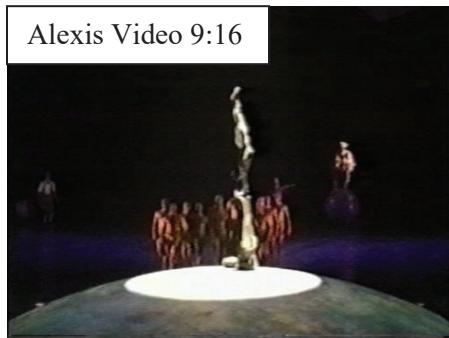
25 The above segments are identical. The bottom sibling lowers their legs and then flips over onto their stomachs.



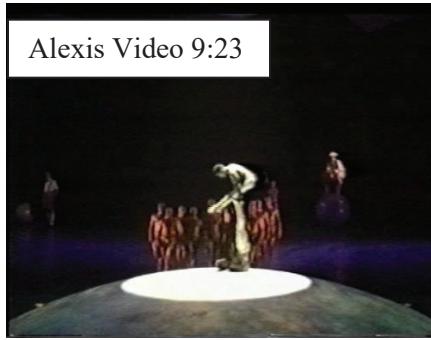
7 The above segments are identical. The bottom sibling lowers the top sibling to the ground, lays there for a
8 moment, and then lifts the top sibling back up.



14 The above segments are identical. The bottom sibling flips back onto their stomach, while balancing the top
15 sibling on their feet.



21 The above segments are identical. The bottom sibling straightens their legs, lifting the top sibling into the air.



7 The above segments are identical. The top sibling flips off the bottom sibling.

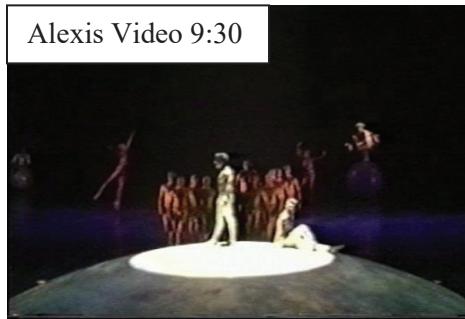
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20 The above segments are identical. One sibling sits facing away from the other standing sibling as the lights dim and other performers enter the stage. This ends the performances.

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26 As an initial matter, the Court agrees with Defendants that hand-balancing poses
 27 themselves are not copyrightable elements, just as individual dance moves are not
 28 copyrightable. *Cf* Compendium of U.S. Copyright Office Practices (Third) § 805.5(A) (2021).
 29 (“Individual movements or dance steps by themselves are not copyrightable, such as the basic
 30 waltz step, the hustle step, the grapevine, or the second position in classical ballet.”). However,
 31 copyright protections do extend to “the composition and arrangement of ‘a related series of
 32 dance movements and patterns organized into a coherent whole.’” *Id.* Therefore, a collection of
 33 otherwise uncopyrightable choreographic elements, such as hand-balancing poses, are eligible
 34 to receive copyright protections under the extrinsic test when ““those elements are numerous
 35 enough and their selection and arrangement original enough that their combination constitutes
 36 an original work of authorship.”” *Gray v. Perry*, No. 2:15-CV-05642-CAS-JCx, 2020 WL
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1 1275221, at *3 (C.D. Cal. Mar. 16, 2020) (quoting *Satara v. Lowry*, 323 F.3d 805, 811 (9th Cir. 2003)). Accordingly, like in dance, the sequencing and numerous transitions that make the Alexis Brothers' hand-balancing routine a work of authorship are protected, and thus, the Court could find that the similarities in the two performances constitute copyright infringement.

5 Since the Alexis Brothers identified similarities between the Work and the Kolev
6 Sisters' performance, and none of those similarities are based on unprotectable material or
7 authorized use, the remaining task for the Court in this extrinsic analysis is to determine the
8 scope of protection. As a threshold matter of scope, the Court first must determine whether
9 copying a small segment of a copyrighted work still constitutes an infringement. In this case, it
10 is clear that the entirety of the Work has not been copied by the Kolev Sisters. As Defendants
11 point out, the majority of the Kolev Sisters' 8-minute performance is unique from the Work;
12 only a few minutes of the Kolev Sisters' act, spread out over two separate segments, present a
13 similar sequencing of poses. (See Defts.' Suppl. Brief 12:1–12). However, *Universal Pictures*
14 *Co. v. Harold Lloyd Corp.*, 162 F.2d 354, 361 (9th Cir. 1947), states with regards to copyright
15 infringement: "The whole picture need not be copied to constitute infringement. The mere
16 copying of a major sequence is sufficient." Here, the two similar segments identified by the
17 Alexis Brothers constitute a major sequence of the Work. Though the similar segments
18 represent only a few minutes of alleged copying, the Work and the Kolev Sisters' act are only
19 twelve and eight minutes long, respectively, so even one minute of copying represents a major
20 sequence, especially if that sequence includes the finale of the performance.

21 The Court also finds *Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc.*, 772 F.2d 505
22 (9th Cir. 1985), to be instructive. *Frank Music* is a copyright infringement case concerning a
23 musical revue show staged by the MGM Grand Hotel in Las Vegas. 772 F.2d at 509–510. The
24 musical revue included five songs from the copyrighted play *Kismet*, and thus, *Kismet*'s
25 copyright owner brought a suit for copyright infringement. *Id.* The Ninth Circuit upheld the

1 district court's determination that the show's use of these portions of the copyrighted work still
2 constituted an infringement of *Kismet*'s copyright. *Id.* at 512. Likewise, in the present case, the
3 Court may find that Defendants' use of portions of the Alexis Brothers' hand-balancing Work
4 constitutes an infringement.

5 Finally, the Court turns to the scope of protection and finds that the Alexis Brothers'
6 hand-balancing Work is only entitled to a "thin" copyright. As discussed above, copyrighted
7 works receive either "thick" or "thin" protection against infringement. A copyright receives
8 "thick," or broad, protection when the possible range of protectable expression is broad, such as
9 when there are "endless variations of expression available to the artist." *McCulloch v. Albert E.*
10 *Price, Inc.*, 823 F.2d 316, 321 (9th Cir. 1987). In contrast, a copyright receives "thin," or
11 narrow, protection "when the range of protectable expression is narrow." *See Apple Computer,*
12 35 F.3d at 1446–47. In general, copyrights involving a combination of otherwise individually
13 unprotectable elements receive thin protection. *See, e.g., Satava v. Lowry*, 323 F.3d 805, 812
14 (9th Cir. 2003). In *Satava v. Lowry*, the Ninth Circuit found that "[the plaintiff] possesses a
15 'thin' copyright that protects against only virtually identical copying" because the copyrighted
16 work [a glass jellyfish sculpture] was comprised of a combination of elements that were already
17 in the public domain. *Id.* The *Satava* court explained that "[the plaintiff] may prevent others
18 from copying the original features he contributed, [such as the distinctive curls of particular
19 glass tendrils, the arrangement of certain hues, or the unique shape of the jellyfishes' bells], but
20 he may not prevent others from copying elements of expression that nature displays for all
21 observers, or that the glass-in-glass medium suggests to all sculptors." *Id.* The Ninth Circuit
22 has further found that "thin" copyright protection extends to other "collection[s] of
23 unprotectable elements—pose, attitude, gesture, muscle structure, facial expression, coat, and
24 texture." *Folkens v. Wyland Worldwide*, 882 F.3d 768 (9th Cir. 2018) (emphasis added). *But*
25 *see Williams v. Gaye*, 885 F.3d 1150 (9th Cir. 2018) (finding that musical copyrights are not

1 limited to thin protections even though a copyrightable musical sequence is made up of
 2 unprotectable elements because musical compositions are not confined to a narrow range of
 3 expression). In sum, thin copyrights exists when there is only a narrow range of possible
 4 expression, such as when the copyrighted work is composed of a sequence of individually
 5 uncopyrightable elements.

6 Here, as discussed above, the Alexis Brothers' hand-balancing Work is a collection of
 7 uncopyrightable elements. *See* Compendium of U.S. Copyright Office Practices (Third) §
 8 805.5(A) (2021) ("The individual elements of a dance are not copyrightable for the same reason
 9 that individual words, numbers, notes, colors, or shapes are not protected by the copyright
 10 law."). Further, like the glass mediums in *Satava* were available for use by all sculptors, the
 11 poses depicted in the Work are available to be used by all hand-balancing performers; the range
 12 of expression is narrow because the protected Work is merely a sequence of uncopyrightable
 13 elements that are already in the public domain. *Satava*, 323 F.3d at 812. Therefore, the Court
 14 treats the protections afforded by the choreography copyright in this case as "thin." *Cf Open*
 15 *Source Yoga Unity v. Choudhury*, No. C 03-3182 PJH, 2005 WL 756558, at *4–5 (N.D. Cal.
 16 Apr. 1, 2005) (finding that if yoga could be copyrighted as choreography, it would only have a
 17 "thin" copyright because it would protect only the arrangement of the poses and not the poses
 18 themselves).

19 A "thin" copyright only protects against infringement that is "virtually identical
 20 copying." *See, e.g. Ets-Hokin v. Skyy Spirits, Inc.*, 323 F.3d 763, 766 (9th Cir. 2003) ("When
 21 we apply the limiting doctrines, subtracting the unoriginal elements, Ets-Hokin is left with . . . a
 22 'thin' copyright, which protects against only virtually identical copying."). As such, in order
 23 for the Court to find that the Kolev Sisters' performance is substantially similar to the Work for
 24 the purposes of the extrinsic analysis, the Court must determine whether either Segment 1 or
 25 Segment 2 is "virtually identical." *See Gray v. Perry*, No. 2:15-CV-05642-CAS-JCx, 2020 WL

1 1275221, at *3 (C.D. Cal. Mar. 16, 2020) (“For a plaintiff that seeks to apply [thin] protection
2 to works where there is a narrow range of available creative choices, the defendant’s work
3 would necessarily have to be ‘virtually identical’ to the plaintiff’s work in order to be
4 substantially similar.”) (internal citations omitted). After careful comparisons of the Kolev
5 Video and the Alexis Video, the Court finds that Segment 1 presents several instances of
6 noticeable variation in the poses and transitions throughout the performances, particularly in the
7 siblings’ leg placement as they execute each pose, as noted above. While Segment 1 certainly
8 depicts two very similar performances, the consistent variations make the Court unable to
9 determine that Segment 1 of the Work and Segment 1 of the Kolev Sisters’ performance are
10 “virtually identical.” To the contrary, Segment 2 of the Work and Segment 2 of the Kolev
11 Sisters’ performance are “virtually identical.” Though the beginning of Segment 2 reveals a
12 minor variation in leg placement, the remaining minute and a half of the performances are
13 completely identical. Therefore, the Court finds that because Segment 2 is “virtually identical”
14 in each performance, Segment 2 is substantially similar for the purposes of the extrinsic
15 analysis.

ii. Intrinsic Test

17 The intrinsic portion of the infringement analysis is a subjective comparison that focuses
18 on whether the ordinary, reasonable audience would find the works substantially similar in the
19 “total concept and feel” of the work. *Cavalier v. Random House, Inc.*, 297 F.3d 815, 822 (9th
20 Cir. 2002). The trier of fact is required to ask whether an ordinary, reasonable observer would
21 consider the copyrighted work and allegedly infringing works virtually identical. *Id.* The
22 intrinsic test “measures expression subjectively from the standpoint of the ordinary reasonable
23 observer” with no expert assistance. *See Aurora World, Inc. v. TY Inc.*, 719 F. Supp. 2d 1115,
24 1134 (C.D. Cal. 2009) (quoting *Apple Computer Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1442
25 (9th Cir. 1994)). “While usually reserved for the trier of fact, courts may properly consider the

1 intrinsic test when resolving a preliminary injunction.” *Chase-Riboud v. Dreamworks, Inc.*, 987
 2 F. Supp. 1222, 1226 n.4 (C.D. Cal. 1997).

3 Here, since only Segment 2 survived the extrinsic analysis, the Court need only consider
 4 whether an ordinary reasonable observer would determine that Segment 2 is virtually identical.
 5 *Corbello*, 974 F.3d at 974 (“Only if the extrinsic analysis succeeds does the so-called ‘intrinsic’
 6 analysis take[] place.”). The Court finds that while it would be apparent to the ordinary
 7 observer that the entirety of the two performances are not identical, it would also be apparent
 8 that Segment 2 is identical because the finales of both performances have almost no variation.
 9 Any variation that does exist only becomes apparent through careful scrutinization of each
 10 video using side-by-side comparisons, frequent stops and starts, and screenshots, which are
 11 tools that may not be available to the ordinary reasonable observer, particularly at a live show.
 12 Accordingly, an ordinary reasonable observer would likely find Segment 2 to be virtually
 13 identical.

14 Because Segment 2 passes both the extrinsic and intrinsic tests, the substantial similarity
 15 element of the infringement analysis is also satisfied. As such, the Alexis Brothers have
 16 demonstrated a likelihood of success at showing both ownership of a valid copyright and
 17 copying of the protected elements of the Work. The Court finds that the Alexis Brothers met
 18 their burden to demonstrate a likelihood of success on the merits with respect to copyright
 19 infringement, but based only on Segment 2 of the Work.

20 **B. Irreparable Harm**

21 The Alexis Brothers claim that they suffer irreparable harm when the Kolev Sisters’
 22 perform the infringing hand-balancing act without obtaining a license because it “diminishes
 23 the originality of the Work in the public’s perception.” (Mot. Prelim. Inj. 20:17–19). Further,
 24 the Alexis Brothers explain that they are now unable to market the Work to prospective venues
 25 as original and exclusive. (*Id.* 20:24–26). Defendants counter that because the Work and the

1 Kolev Sisters' performance have differences, and because the Kolev Sisters are less athletic and
2 experienced, the Alexis Brothers should not have an issue marketing the performance
3 elsewhere. (Resp. 15:5–23, ECF No. 18).

4 In copyright cases, establishing that an infringement has occurred does not create a
5 presumption of irreparable harm. *Flexible Lifeline Sys. v. Precision Lift, Inc.*, 654 F.3d 989, 998
6 (9th Cir. 2011). Instead, the plaintiff must proffer additional evidence to demonstrate a
7 likelihood of irreparable harm. *Herb Reed Enters., LLC v. Fla. Entm't Mgmt., Inc.*, 736 F.3d
8 1239, 1251 (9th Cir. 2013). Evidence of irreparable harm for copyright purposes must be tied
9 to the ultimate goals of copyright protection, namely, “the marketable right to the use of one’s
10 expression.” *Cf Garcia v. Google, Inc.*, 786 F.3d 733, 744 (9th Cir. 2015) (“The justification of
11 the copyright law is the protection of the commercial interest of the author.”). The Ninth
12 Circuit has recognized that “[e]vidence of threatened loss of prospective customers or goodwill
13 certainly supports a finding of the possibility of irreparable harm.” *Stuhlbarg Int'l Sales Co., Inc. v. John D. Brush & Co., Inc.*, 240 F.3d 832, 841 (9th Cir. 2001).

15 Here, evidence of the Alexis Brothers’ irreparable harm is evident because they lost the
16 “marketable right to the use of [their] expression” when Cirque hired the Kolev Sisters to
17 perform a portion of the Alexis’ Brothers Work. *Garcia*, 786 F.3d at 744. During the
18 preliminary injunction hearing, the Alexis Brothers explained that they expected to be re-hired
19 by Cirque to perform in Mystere when the show reopened. (Prelim. Inj. Hearing Tr. 10:12:10–
20 10:17:57). However, when Cirque hired the Kolev Sisters to perform a copy of the Work
21 instead, the Alexis Brothers lost the ability to market the Work to Cirque, and thus, lost
22 business. In short, because Cirque hired the Kolev Sisters to perform an act that the Alexis
23 Brothers should have had the exclusive right to market, the Alexis Brothers have direct
24 evidence of harm to their commercial interests. As such, the loss of Cirque as a prospective
25

1 customer supports a finding of irreparable harm. *See Stuhlbarg*, 240 F.3d at 841 (9th Cir.
2 2001).

3 **C. Balance of the Equities**

4 The Alexis Brothers' claim that the balance of the equities weighs in their favor because
5 while they are suffering irreparable harm, Cirque could easily substitute a different act in place
6 of the Kolev Sisters, which they have done in the past. (Mot. Prelim. Inj. 21:4–9). For
7 example, when Mystere reopened, Cirque hired two Russian performers to fill the hand-
8 balancing segment of show from June 28, 2021, until July 26, 2021, because the Kolev Sisters
9 did not debut until July 27, 2021. (*See* Compl. ¶¶ 17–18). Defendants argue that they cannot
10 easily substitute a different act because the Kolev Sisters are under contract. (Resp. 15:25–
11 16:1). Therefore, granting the preliminary injunction would create serious hardship for Cirque
12 and the Kolev Sisters with respect to what will happen with their contract. (*Id.*). Further,
13 Defendants explain that a hand-balancing routine takes years to create and perfect, so the Kolev
14 Sisters could not alter their act without serious hardship. (*Id.* 16:1–8). However, during the
15 preliminary injunction hearing, the parties reported that the Kolev Sisters are not currently
16 performing the infringing act in Mystere because they are out of the country, and so Cirque has
17 again employed the Russian performers to replace the Kolev Sisters. (Prelim. Inj. Hearing Tr.
18 9:35:23–9:35:54; 11:06:50–11:07:28). Because Cirque has demonstrated that they can replace
19 the Kolev Sisters with performers who previously performed in Mystere, the Court finds that
20 the balance of the equities tips in the Alexis Brothers' favor.

21 **D. Public Interest**

22 Upholding copyright protections is in the public interest. *See, e.g.*, *Warner Bros. Home*
23 *Entm't Inc. v. Jacek*, No. CV 13-04065, 2013 WL 12134186, at *5 (C.D. Cal. Dec. 20, 2013)
24 (explaining that issuing a preliminary injunction is in the public interest because it “protects
25 holders of valid copyrights and discourages copyright infringement”). Accordingly, an

1 injunction entered against Defendants to discourage infringement of the Alexis Brothers'
 2 copyright supports the public interest.

3 **E. Injunctive Relief**

4 The Alexis Brothers have established: (1) a likelihood of success on the merits of their
 5 copyright infringement claim with regards to Segment 2; (2) irreparable harm if an injunction is
 6 not granted; (3) the balance of equities tips in their favor; and (4) an injunction is in the public
 7 interest. Therefore, the Court may order injunctive relief for the Alexis Brothers' copyright
 8 infringement claim. *See Am. Trucking*, 559 F.3d at 1052 (9th Cir. 2009) (quoting *Winter*, 555
 9 U.S. at 20). The Alexis Brothers request that the Court enjoin the Kolev Sisters from
 10 performing the entirety of their act in *Mystere*.⁶ However, the Court finds that an injunction of
 11 this magnitude is overbroad.

12 In general, injunctive relief "must be narrowly tailored to remedy the specific harm
 13 shown." *East Bay Sanctuary Covenant v. Barr*, 934 F.3d 1026, 1029 (9th Cir. 2019) (quoting
 14 *City & County of San Francisco v. Trump*, 897 F.3d 1225, 1244 (9th Cir. 2018)). Under 17
 15 U.S.C. § 502(a), a district court has discretion to "grant temporary and final injunctions on such
 16 terms as it may deem reasonable to prevent or restrain infringement of a copyright." Further,
 17 Nimmer on Copyright, which is commonly cited in this Circuit as persuasive authority with
 18 regards to copyright infringement claims, explains:

19 a product that slavishly reproduces a copyrighted work or in which the
 20 infringement permeates the whole should be wholly enjoined . . . [b]y contrast, if
 21 the infringing portion of defendant's work can be removed, without destroying
 the usefulness of the remainder of the work, the whole work need not be enjoined.

22 4 Nimmer on Copyright § 14.06 (internal citations omitted). *See also Bell v. Wilmott*
 23 *Storage Servs., LLC*, 12 F.4th 1065, 1074 (9th Cir. 2021) (citing 4 Nimmer on
 24 Copyright).

25 ⁶ Likewise, Defendants assert that the Court should enjoin none of the Kolev Sisters' act.

1 In the present case, the Court finds that “the whole work need not be enjoined” to
2 remedy the harm caused to the Alexis Brothers by Defendants’ alleged infringement of
3 their copyright. 4 Nimmer on Copyright § 14.06. Because only Segment 2, the finale, of
4 the Kolev Sisters’ performance demonstrates a likelihood of copyright infringement,
5 only the continued performance of Segment 2 poses harm to the Alexis Brothers.
6 Therefore, if the Kolev Sisters refrain from performing the finale of their act, or modify
7 it so that it is not identical to the finale of the Work, then the harm will be remedied.
8 This rings especially true when considering that the remainder of the Kolev Sisters’ act
9 is unique from (or at least not “virtually identical” to) the Work, and thus, cannot violate
10 the Alexis Brothers’ copyright. In order to narrowly tailor injunctive relief to fit the
11 specific harm shown in this case, the Court need not enjoin Defendants from performing
12 the Kolev Sisters’ entire act. *See East Bay*, 934 F.3d at 1029. Therefore, the Court
13 exercises its discretion to fashion appropriate relief to prevent copyright infringement,
14 and enjoins Defendants from performing Segment 2 of the Kolev Sisters’ act. *See* 17
15 U.S.C. § 502(a).

16 **F. Bond**

17 A preliminary injunction must be accompanied by payment of a bond “in such a sum as
18 the court deems proper, for the payment of such costs and damages as may be incurred or
19 suffered by any party who is found to have been wrongfully enjoined or restrained.” Fed. R.
20 Civ. P. 65(c). “The district court is afforded wide discretion in setting the amount of the bond,
21 and the bond amount may be zero if there is no evidence the party will suffer damages from the
22 injunction.” *Conn. Gen. Life Ins. Co. v. New Images of Beverly Hills*, 321 F.3d 878, 882 (9th
23 Cir. 2003). “So long as a district court does not set such a high bond that it serves to thwart
24 citizen actions, it does not abuse its discretion.” *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d
25

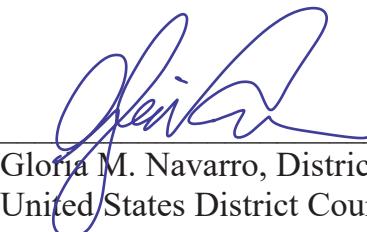
1 1113, 1126 (9th Cir. 2005) (citing *Friends of the Earth, Inc. v. Brinegar*, 518 F.2d 322, 323
2 (9th Cir. 1975)).

3 In the present case, Defendants argue that bond should be entered in the amount of
4 \$500,000. Nonetheless, the Alexis Brothers assert that payment of the bond in this case should
5 be waived because Cirque can easily substitute a different act for the Kolev Sisters' segment of
6 the show. (Mot. Prelim. Inj. 23:5–24:3, ECF No. 5). The Court agrees because Defendants'
7 request for a \$500,000 is not supported by any evidence. At the preliminary injunction hearing,
8 Defendants were neither able to provide a basis for the \$500,000 calculation, nor produce any
9 evidence of prospective damages from an injunction, especially when considering that the
10 Kolev Sisters are not currently performing. (Prelim. Inj. Hearing Tr. 11:02:51–11:03:28).
11 Accordingly, the Court finds that there is no evidence that Defendants will suffer harm from an
12 injunction, and thus, the bond amount shall be zero. *See Conn. Gen. Life Ins.*, 321 F.3d at 882.

13 **IV. CONCLUSION**

14 **IT IS HEREBY ORDERED** that the Alexis Brothers' Motion for Preliminary
15 Injunction, (ECF No. 5), is **GRANTED in part** and **DENIED in part** to the extent consistent
16 with this Order. Defendants are enjoined from performing the finale of the Kolev Sisters' act.

17 **DATED** this 10 day of March, 2022.

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20 
Gloria M. Navarro, District Judge
United States District Court